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Court of Criminal Appeals
P.O. Box 12308, Capitol Station
Austin, Texas 78711

Re: *Ex parte Jones*, No. PD-0552-18

To the Honorable Court of Criminal Appeals,

Last week, the Illinois Supreme Court upheld a statute prohibiting "non-consensual dissemination of private sexual images,"[1] which says in relevant part:

> A person commits non-consensual dissemination of private sexual images when he or she:
>
> (1) intentionally disseminates an image of another person:
> (A) who is at least 18 years of age; and
> (B) who is identifiable from the image itself or information displayed in connection with the image; and
> (C) who is engaged in a sexual act or whose intimate parts are exposed, in whole or in part; and
> (2) obtains the image under circumstances in which a reasonable person would know or understand that the image was to remain private; and
> (3) knows or should have known that the person in the image has not consented to the dissemination.[2]

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1 *People v. Austin*, __ N.E.3d __, No. 1239102019, WL 5287962 (2019).

2 720 Ill. Comp. Stat. Ann. 5/11-23.5(b).

Subsection (c) exempts dissemination: 1) "for the purpose of a criminal investigation that is otherwise lawful," 2) "for the purpose of, or in connection with, the reporting of unlawful conduct," 3) "when the images involve voluntary exposure in public or commercial settings," or 4) when it "serves a lawful public purpose."[4]

The court decided, in separate analyses, that this statute was not 1) facially unconstitutional under the appropriate level of scrutiny, or 2) facially overbroad for restricting a substantial amount of protected speech relative to its legitimate sweep.[5] It is an orderly application of two distinct areas of law.

The court reviewed the statute under intermediate scrutiny rather than strict scrutiny because it "is a content-neutral time, place, and manner restriction."[6] It discussed with approval the "secondary effects case" of *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986),[7] and concluded, "The *manner* of the image's acquisition and publication, and not its *content*, is thus crucial to the illegality of its dissemination."[8]

As a separate basis for applying intermediate scrutiny, the court held that "speech on matters of private concern that invades the privacy interests of nonpublic figures does not enjoy the same degree of first amendment protection as speech on matters of public concern or relating to public figures."[9] The court "ha[d] no difficulty in concluding that the nonconsensual dissemination of the victim's private sexual images was not an issue of public concern."[10] As such, the statute "does not pose such inherent dangers to free expression or present such potential for censorship or manipulation as to justify application of strict scrutiny."[11]

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4 720 Ill. Comp. Stat. Ann. 5/11-23.5(c).

5 The court also held it was not vague, which is not an issue in this case.

6 *Id*. at *7 (¶43).

7 *Id*. at *8 (¶47).

8 *Id*. at *8 (¶49) (emphasis in original).

9 *Id*. at *11 (¶65).

10 *Id*. at *9 (¶56).

11 *Id*. at *10 (¶57).

Applying intermediate scrutiny, the court again "ha[d] no difficulty in concluding that [the statute] serves a substantial government interest unrelated to the suppression of speech."[12] "It is well established that government can protect individual privacy rights[,]"[13] and "the nonconsensual dissemination of private sexual images causes unique and significant harm to victims in several respects."[14] The court looked to the plain language of the statute when it concluded the statute does not burden substantially more speech than is necessary to accomplish its goal.[15] In held that the government's substantial interest "would be achieved less effectively absent [the statute,]"[17] rejecting the argument that civil remedies are adequate.[18]

As for overbreadth, the court held the statute does not prohibit a substantial amount of protected speech in relation to its legitimate sweep.[19] It rejected numerous hypothetical examples of overbreadth as being based on a misreading of the statute or on situations that are "rare and should be addressed on a case-by-case basis."[20] It discounted the absence of an explicit requirement of malicious intent because it "is divorced from the legislative goal of protecting the privacy of Illinois citizens."[21] It also found no basis for invalidating the statute for the absence of an explicit "harm" requirement, finding the prohibited conduct inherently harmful.[22]

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12 *Id*. at *12 (¶69).

13 *Id*. at *10 (¶62).

14 *Id*. at *12 (¶66).

15 *Id*. at *14-15 (¶78-83) (referring to the elements under subsections (a) and (b)).

17 *Id*. at *13 (¶71).

18 *Id*. at *13 (¶73) ("Civil actions are inadequate."), *14 (¶76) ("Criminalization is a vital deterrent.").

19 *Id*. at *18 (¶93).

20 *Id*. at *17-18, 20 (¶95-98, 107).

21 *Id*. at *18-19 (¶101-02). The court went on to say an intent to harm is inherent in the other elements. *Id*. at *20 (¶106).

22 *Id*. at *20 (¶108).

Respectfully Submitted,

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